

COVID-19 Vaccine Employer Checklist

*This document will be updated as information becomes available.
Please check back frequently.*

Updated March 2021



Executive summary

With the emergency use authorization¹ approval of vaccines, employers are trying to determine the right strategy for their on-site workforce and how this impacts their work site.

The rollout of the vaccine is in phases and varies by state. As of March 22, 2021, 127 million vaccine doses had been administered in the U.S.² The distribution of vaccines has been slower than anticipated, primarily due to the execution of the rollout between the federal government and the states. Additional delays include holding half of the doses for the second vaccine, as well as the initial Centers for Disease Control and Prevention (CDC) recommendation to initially roll out the vaccines primarily to people over the age of 75.

On March 11, 2021, President Joe Biden **announced** all Americans will be eligible for vaccinations by May 1, 2021. The administration will also increase the number of places Americans can get vaccinated, increase the number of people providing and supporting vaccinations, and provide tools to make it easier for individuals to find a vaccine, among other steps.

Today, employers can take many steps to prepare. The experts at Lockton Companies have put together a list of items and issues to consider as employers determine the best course of action for their workforce.

THE CHECKLIST ADDRESSES:

1. Covering the cost of vaccines
2. Developing a vaccine policy
3. Developing a communication plan
4. Navigating where your workforce can get a vaccine

It is important to maintain safety protocols throughout this time and even after getting the vaccine.

Employer decisions

While we are still early in the vaccine rollout process, there are specific steps employers can, or must, take today and areas employers can begin considering for the near future.

Cover the cost

Cover the cost of federally approved vaccines without cost sharing for vaccines received from in-network and out-of-network providers.³Federal law requires group health plans to provide this coverage. The mandate **requires** covering the cost of the vaccine itself, administration cost, and, unless billed separately, the office visit. The effective date was Jan. 5, 2021 for Pfizer-BioNTech, Jan. 12, 2021 for Moderna, and March 19, 2021 for Johnson & Johnson, so plan sponsors should confirm with their medical insurance carrier, third-party claims administrator or pharmacy benefit manager that they are administering this coverage appropriately. As noted below, the recent guidance from OSHA is that employers should offer the vaccine to employees at no cost. While this is not mandated, it may be in the near term.

Develop a vaccine policy

Employers should decide whether they will simply communicate the importance of getting vaccinated, provide incentives or mandate the vaccine. This decision will be influenced by their industry, culture and legal interpretations for their locations. A culturally appropriate awareness education campaign may assist in increasing the number of employees who choose to be vaccinated regardless of the approach taken.

ADA implications are two-fold

PRESCREENING QUESTIONS

While neither the vaccine itself nor the act of administering the vaccine is a medical exam, the Equal Employment Opportunity Commission (EEOC) advises that the prescreening questions may implicate the Americans with Disabilities Act (ADA)'s provision on disability-related inquiries because the questions are likely to elicit information about a disability.

- If you mandate the vaccine and administer the vaccine, you must show that the prescreening questions are “job-related and consistent with business necessity.”

REASONABLE ACCOMMODATIONS

In the event an employee identifies a medical reason to not be vaccinated, a reasonable accommodation must be considered.

- Can a reasonable accommodation reduce the direct threat without undue hardship?
- Engage in the **interactive process** and make an **individualized assessment**.
 - Consider (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood the potential harm will occur; and (4) the imminence of the potential harm.
 - If there is a direct threat, can it be reduced to an acceptable level by providing an accommodation such as PPE, enclosed office space or social distancing?
 - Other considerations include: how many employees were vaccinated, is there contact with customers, and what is the community-wide vaccination rate?
 - While an **employee who refuses the vaccine** on account of an ADA-covered condition may be “excluded” from the workplace, the EEOC cautions it is temporary and does not mean automatic termination.
 - Consider remote work options or a leave of absence.

Workers’ compensation considerations

An employee vaccinated as part of a COVID-19 vaccination program who is injured as the result of an adverse reaction may have a compensable workers’ compensation claim.

- Evaluating if the vaccine program was mandatory, recommended and/or associated with employee rewards will all be part of the process of determining if the injury, disease or death resulting from the vaccine is considered to arise out of or in the course of their employment. The specific case facts and applicable workers’ compensation acts will ultimately determine the compensability of claims that may result.

OSHA guidance

On Jan. 29, 2021, the federal Occupational Safety and Health Administration issued guidance and recommendations. Emergency Temporary Standards (ETS) were to be issued on or before March 15, 2021; however, on March 12, 2021, OSHA launched a National Emphasis Program – Coronavirus Disease 2019 (Program) and Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (Response Plan). It is unclear at this time whether the Program and Response Plan were issued in lieu of ETS or as a part of any future ETS. The Program is effective immediately and focuses on high hazard industries and hazards common in certain workplaces. Per the original January guidance, OSHA advises:

- Employers should make the COVID-19 vaccine available to eligible employees at no cost; and
- Employers should provide information and training to employees on the benefits and safety of the vaccine.

Monitor state and local statutes and laws

State law anti-discrimination protections may be broader than federal law. Additionally, there is pending legislation in more than 25 states that would prohibit employers from mandating the vaccine. Be sure to check the status of any applicable state laws before proceeding with a vaccine mandate.

If you operate in states with different laws or regulations, your policy may need to vary state-to-state to remain compliant.

Labor issues

If employees are unionized, a vaccination program may be a mandatory subject of bargaining.

- Protected concerted activity: Even in the absence of a union, if employees collectively refuse to be vaccinated without an ADA-qualifying reason or religious objection, this action may qualify as “protected concerted activity” and subject the employer to potential liability if adverse employment actions are taken.

Cost

- The cost must be covered by your health plan for federally approved vaccines.³
- The health plan must pay for the vaccine and its administration (unless office visit is billed separately).
- Employer may also implement an employer-paid, on-site vaccination program outside of the health plan.

Establish a written vaccination program

- Ensure compliance with federal guidance, state and local regulations.
- Identify the scope of the workforce covered and explain the business justification including language demonstrating the policy is consistent with CDC guidance.
- Set forth the process for obtaining the vaccine and deadline for being vaccinated.
- Discuss compensable time issues.
- Identify the process for providing proof of the vaccine.
- Include clear policies for an accommodation process.
- Set forth how noncompliance will be addressed.

CAN YOU MANDATE THE COVID-19 VACCINE?

Yes, in some circumstances. From a federal employment law standpoint, the recent guidelines from the Equal Employment Opportunity Commission (EEOC) indicate that under the Americans with Disabilities Act (ADA), an employer may mandate the vaccine when a worker poses a **“direct threat”** to themselves or others by their physical presence in the workplace absent the vaccine.

- A “direct threat” is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- The key inquiry is whether an unvaccinated employee exposes others to the virus at the workplace.
- **The vaccine cannot be mandated for remote employees.**
- **Pregnancy accommodations:** Any of the currently authorized COVID-19 vaccines can be offered to people who are **pregnant or breastfeeding**.
 - Provide the same accommodations to pregnant employees as provided to other non-disabled employees who object to receiving the vaccine until they can be vaccinated.
 - State law may afford additional protections to pregnant employees who object to a mandatory vaccine policy.
- **Title VII religious accommodations:** An employer must provide a reasonable accommodation to an employee’s sincerely held religious belief that prevents them from being vaccinated unless it would pose an undue hardship — more than a de minimis cost or burden on the employer (less stringent standard than the ADA).
 - A similar interactive process involving individualized, fact-based inquiry.
 - The definition of religion is broad and may protect beliefs the employer is unfamiliar with. If there is an objective basis for questioning the sincerity of a religious belief, the employer may request more information to substantiate the belief.
- **Other exemptions:** If an employer chooses to allow an employee an exemption from a mandatory vaccination policy for a reason not otherwise protected by federal, state or local law, all similarly situated persons should be treated the same to avoid claims of discrimination based on other protected characteristics such as age, sex and race.

HOW CAN EMPLOYERS AVOID ADA IMPLICATIONS WITH THE PRESCREENING PROCESS?

- If you have a mandatory vaccine program, use a third party that does not have a contract with the employer to administer the vaccine and handle the prescreening questions.
- Make the vaccination program voluntary so the employee has the choice to answer the prescreening questions.

ISSUES TO CONSIDER WITH A MANDATORY VACCINATION PROGRAM

- Will every employee of the company be required to be vaccinated?
 - If so, can you meet the “direct threat” standard for every job classification?
 - Is a hybrid approach in which the vaccine mandate only applies to certain job classifications supported by CDC guidance?
- What if a large portion of your workplace refuses to be vaccinated?
 - If employees do not have a valid objection under Title VII or the ADA, will you terminate all employees who refuse to be vaccinated?
 - If persons who refuse are not treated consistently, this may lead to discrimination claims; need a clear process in your vaccination plan.
- Will you require employees to provide proof of the vaccine?
 - If so, caution employees to not provide health information.
 - The ADA and Genetic Information Nondiscrimination Act (GINA) are potentially implicated if medical information is provided.
- Even if the vaccine is not mandated, you may ask for proof of the vaccine.
 - With a voluntary policy, do not ask persons why they were not vaccinated as that may elicit disability-related information.
- Consider compensation issues for non-exempt employees under the Fair Labor Standards Act (FLSA).
 - Travel time to/from vaccination site.
 - Time spent being vaccinated.
- How will you address potential side effects from the vaccination?
 - The American Rescue Plan Act of 2021 (ARPA) allows employers with fewer than 500 employees to voluntarily provide emergency paid sick leave and benefit from a tax credit when leave is needed to recover from an illness associated with the COVID-19 vaccine.
 - State law may provide employees with paid time off to address any illness or side effects from the vaccination as well. California has enacted legislation that requires employers with 26 or more employees to provide such paid leave (capped at \$511/day).
 - Use a staggered schedule for vaccinations so not all employees are vaccinated the same day.
 - Provide additional PTO to employees experiencing ill side effects.
 - State or local paid sick leave laws would provide leave.
- What if an employee has a reaction to the first dose? Will you still require the employee to receive the second dose?
- When will the policy go into effect?
 - Can you delay until the vaccine supply is greater and available to all persons?
 - Would you have less resistance if more time elapsed?
- What is the timeframe or deadline by which employees must be vaccinated?
 - Will depend on local availability and will vary state-by-state.
 - What if another vaccination or booster is necessary months later?
- **Potential exceptions:** What if an employee has had COVID-19 within the last 90 days?
 - This would be a reason for delay and not an exemption from the policy.

WHAT ARE THE ALTERNATIVES TO MANDATING THE COVID-19 VACCINE?

- Educate employees on the facts about the vaccine.
 - Informational Q&A (See more under the “Develop a vaccine communication plan” section below.)
 - Distribute updates through postings, email and social media.
- Encourage employees to be vaccinated.
- Make it easy for employees.
 - Provide step-by-step instructions on how to register and make an appointment, if required in your county.
 - Provide computer access to employees who don’t otherwise have access.
- Will you offer the incentive to all employees regardless of whether they choose to be vaccinated?
 - Consider whether incentives will help.
 - If not, ensure incentives do not discriminate against those who would otherwise qualify for an accommodation under the ADA or Title VII. Offer the same or equivalent incentive to persons with a valid objection to the vaccine.
 - If offering paid time off as an incentive, note that New York now requires employers to provide employees with up to four hours of paid leave for each dose of the COVID-19 vaccine (as well as any future booster). California also requires employers with 26 or more employees to provide paid time off (capped at \$511/day) for employees to be vaccinated. Further, the ARPA affords eligible employers a tax credit for affording employees emergency paid sick leave for purposes of receiving the COVID-19 vaccination.
 - Wellness programs and incentives.
 - When the incentive relates to health plan premiums, for example, the safe play is to view the vaccine program as an activity-based rather than participation-based wellness program as some individuals might not be able to participate due to a health status factor, such as pregnancy or a history of severe reactions to vaccines, medications or allergens.
 - Federal rules cap the amount of an incentive for an activities-based wellness program, but those caps are almost certainly too large to come into play with respect to vaccine-related incentives. The rules also, however, require the employer to provide a reasonable alternative method for earning the incentive (or waive the vaccine requirement altogether) for those employees who do not or should not receive the vaccine due to a health status factor.

IF YOU CAN MANDATE THE COVID-19 VACCINE, SHOULD YOU?

- Can you limit the mandate to certain high-risk locations, departments or work sites where alternative means of limiting transmission are not possible or practical?
- Would a voluntary vaccination program yield the same results?
- Would a strategy that encourages but does not require participation work better in your workplace, industry or culture?
- Is a mandatory vaccination program truly necessary given other alternatives such as masks, PPE and social distancing?
- Avoid the legal risks associated with a mandatory vaccine policy by educating and encouraging employees to be vaccinated.

Develop a vaccine communication plan

A big concern is the potential employee reluctance to receiving a COVID-19 vaccine. We recommend employers consider developing a vaccine communication strategy for their workforce. Current public resistance will likely start to shift during phase 1 as healthcare providers champion the importance and safety of the vaccine. There may also be a shift as more and more people get vaccinated around the country and begin to feel more comfortable with the vaccine and the vaccination process. With initial COVID-19 vaccine data showing around 95% efficacy, and a negligible number of severe reactions per million doses, the new vaccine candidates are on par with the best vaccines currently available today for other diseases.

- **Lockton has developed sample employee communications for you to adapt for your workforce.**
- A **vaccination rate tracker** from the CDC can be found **here**.
- This **video series**, produced by the National Alliance of Healthcare Purchaser Coalitions, provides vaccine education initiatives and addresses issues related to vaccine hesitancy.

Direct workforce on where to get a vaccine

How is the vaccine being made available?

The CDC has provided guidance, but which individuals fall into each phase and the timing of each phase will vary by state and in some cases by county and city. Therefore, it is challenging for employers to identify who is eligible and where to go to get a vaccine. Individuals and employers will need to visit their location-specific public health department to learn who is eligible.

- **The National Academy for State Health Policy (NASHP) has provided a state-by-state list of resources to the state's public health sites. It is important to check frequently as the phases are rapidly changing.**

Who is considered an essential worker?

The definition of essential critical infrastructure workers and distribution to this group is ultimately dependent on each state. The Department of Homeland Security's Cybersecurity & Infrastructure Security Agency (CISA) has the responsibility to **define essential critical infrastructure workers** as part of the federal government's guidance provided to jurisdictions for phased vaccine distribution. However, it is ultimately up to the state's jurisdictional vaccine operations group, which controls the supply chain of vaccines distributed within their jurisdiction, to follow this guidance and determine when and how vaccines are allocated to essential critical infrastructure workers.

Who is administering the vaccine?

This also varies by location. Vaccines have been sent to hospitals, private physician practices and independent pharmacies to make available to eligible individuals. We recommend individuals first identify whether they are eligible based on their public health department's phase and reviewing the NASHP link above to locate a vaccine before calling their healthcare provider. This will prevent additional taxation on the healthcare system.

HOW DO INDIVIDUALS SIGN UP FOR THE VACCINE?

Registration for the vaccines for eligible populations is left up to state health departments. Many health departments, counties, cities, hospitals and providers have set up registration portals for only those populations whose phase is permitted in each state.

- **A clear, consistent and repeat communication strategy is the best practice for ensuring employees sign up.**

WHAT CAN WE EXPECT IN THE FUTURE?

- As the availability of vaccines expands to more of the general population, the number of administration venues will be expanded and will likely resemble the retail venues that offer annual flu shots.
- **A few COVID-19 vaccine administration vendors are ready to service employers with vaccines for their workforce, within the confines of state eligibility rules. However, to date, they have not yet acted in this capacity.**
- As vaccines become available to the general population, VaccineFinder can help people find vaccine providers in their area.

Sources

1. An emergency use authorization, or EUA, permits a drugmaker to bring a product to market at an earlier stage in the FDA's review process than is typical.
2. According to **[Bloomberg's COVID-19 vaccine tracker](#)**.
3. The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act requires non-grandfathered group health plans to provide coverage of all COVID-19 related preventive care, including immunizations, within 15 business days after the USPSTF or ACIP recommends the vaccine. A vaccine is embraced by the mandate even if not listed for routine use on the immunization schedules of the CDC. Under federal regulations, an ACIP recommendation is considered in effect after it is adopted by the director of the CDC. That adoption is deemed to occur when the recommendation appears in the CDC's Morbidity and Mortality Weekly Report.



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